Testimony of Robert F. Bauer*

Before the

Committee on House Administration

Hearing on the Regulation of 527 Organizations

April 20, 2005

I appreciate the Committee's invitation to testify on this important question of whether the Congress should act now, two years after the first cycle of experience with BCRA, to enact new legislation regulating "527s." I believe it to be a very bad idea, and there are numerous reasons why.

Some of them have to do with policy, still others craftsmanship: that is to say, we should not do this, and if it were done, in the way proposed, it would be done badly.

In my remarks, I will refer to the most recently circulated version of S. 271, which, I assume, will be incorporated into the House version, H.R. 513.

Policy: Some of the Bad Reasons Given For Regulating 527s

The field of campaign finance reform is overgrown with regulation and proposals for still more. The Supreme Court's decision in *Buckley v. Valeo* counseled that this is a field full of constitutional traps of one kind or another, and that we should be careful, in the interest of protecting speech and association, to avoid them. And each phase of regulation, complicating an already complicated area of the law, imposes new and significant costs on the regulated community: it adds new uncertainties about what the law allows and what it prohibits, and it requires the dedication of fresh resources to the retention of lawyers. The regulation of political activity, touching the most vital rights and interests of Americans, is not and should not be viewed as a routine task.

BCRA is a complex law, and we have had two years to absorb it. There is no basis for revisiting today the decision that Congress made to largely leave to one side 527s and to simply limit their transactions with parties and federal officeholders and candidates. No one is suggesting that 527s have contributed to the corruption of the political process, in the sense

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that the monies they raised and spent skewed public policy in favor of monied or special interests.

Limiting Money. So what is the basis for proceeding now? It appears to be that these organizations made themselves felt in the last election, spending significant sums of money in the aggregate to influence issues of interest to the American public. We see, as we did in the testimony in the Senate in early March, reference to how much money 527s spent to express views on these issues. The Government does not, however, have a constitutionally recognized interest in limiting how much money is spent by organizations on issues, even issues with the potential of affecting how voters perceive the relative merits of candidates and parties.

Making Everyone Play By the Same Rules. Then there is the argument that if 527s influence elections, they should have to be play by the same rules as other organizations that do the same, such as political parties. This emphasis on "playing by the same rules" begs the question: why should they play by the same rules? A number of different types of organizations influence voter choice. The media is an example. We do not have the media "play by the same rules," though there are undoubtedly some who believe that they should.

The rules should apply only to specified types of activities: to monies spent by organizations in the business of coordinating activities with candidates, or expressly advocating their election or defeat, or making contributions to their campaign committees. The 527s targeted by this bill do not do any of this. The ones that the sponsors wish to restrict, by application of the campaign finance rules, conduct issue-based activities—communicating with the public on issues, and rallying voters on the same basis.

The sponsors have said that the 527s who engage in these activities have acknowledged their political purposes by registering for disclosure purposes with the IRS. This also misstates their legal position. They have organized as 527s, filing as such with the Government, because the Internal Revenue Service directed them to this location for the conduct of the kind of activities they are engaged in. The choice these organizations made has no bearing at all on whether they conceded themselves to be—or are—"political committees" under the Federal Election Campaign Act.

A parenthetical remark: In his testimony before the Senate, Senator McCain suggested that I was being inconsistent—though he was hinting at some graver vice—in defending 527s now, when, in 1999, on behalf of a client, I pursued enforcement by the Justice Department against one in particular. I am somewhat pleased that any position I took would command his attention, even attention of a critical kind, or that he would take it to bear in some way on the issues now pending before the Congress. But as he surely knows, the 527 in question was controlled by a federal officeholder, which is precisely what distinguishes it from the 527s under attack today and which even under BCRA would today be impermissible. No one is arguing here that 527s controlled by officeholders are unregulated and the pending bill has nothing to with those kinds of 527s, already prohibited for all intents and purposes by BCRA.

The FEC's "Enforcement Failure." It is also argued that the law already applies to these committees but that they ignore it and the FEC will not enforce it. This is an egregious misstatement. The FEC may suffer from its share of problems in functioning as many would like, but the issues presented by 527 activity--as a matter of statutory and constitutional law--are complex, and there are entirely reasonable differences of opinion among the Commissioners about their authority and the most sensible approach to be taken. For example, the sponsors point to the "major purpose" test as a decisive ground for applying the law to 527s, but as Commissioner Mason correctly pointed out before the Senate, this test is not in the statute and its legal standing is far from settled. The FEC has done what it could here—in my view, far more than it should have or by law was entitled to do. The claim that Congress must step in because the FEC defaulted at its post is a canard.

Political Advantage. It is, sad to say, inevitable that changes in political regulation are appealing to those who believe that it serves their political interests. This was the case with Democrats in the 1970s; and it is true of Republicans today. To allow legal issues to become an opportunity for the one party to steal a march on the other is most unfortunate. If done now again, in the wake of BCRA, it will be sure to happen again in future cycles.

Policy: Some of the Good Reasons for Not Enacting the Proposed New Regulation of "527s"

The Right of Association. The Court in *McConnell v. FEC* sustained a statutory attack on political parties, and in doing so affirmed the declining place of associational rights in the overall scheme of constitutional protections. S. 271 (H.R. 513) now deals a deadly blow to associational rights exercised outside the sphere of political party activity. 527 activity is associational activity: think what one will of the motives and techniques of veterans and others whose 527 activity became notorious in the last cycle, but it is not to be denied that from the Media Fund, to ACT, to Swift Boat Veterans, the activities and organizational efforts in question represented the ardent interests of politically committed Americans sharing a common goal. That wealthy people made much of this possible with large donations is beside the point. To subject this activity to federal restrictions will serve only to limit and diminish it.

Unduly Enlarging the Sphere of Political Regulation. The sponsors claim that they have carved out 501(c)s. But that is, of course, not their intention, as demonstrated by the position that they took before the FEC where they lobbied hard for rules that would reach them. Their choice now, to omit them from the four corners of the bill, is a tactical one. The long-term strategic goal is the same, which is to impose regulatory controls on all "election-influencing activity," including that of 501(c)s that also conduct issue advocacy and issue-based voter mobilization drives. This bill increases the likelihood of this extension to (c) activity by establishing, in the proposed bill, that the Government has an interest in regulating public communications about federal candidates and parties made by organizations other than political parties and registered political committees. Once this interest is established here, it can be extended effortlessly to 501(c)s—and it will be, at some time in the future.

Adversely Affecting State and Local Regulatory Activity. The bill provides an exemption, but a conditioned one, for state and local elections activity. The conditions include the avoidance of voter drive activities promoting or opposing political parties; limitations on the involvement of federal candidates and parties in voter drive activities at the state and local level, above and beyond those imposed by BCRA; and limitations on the geographic scope of operation of State and local PACs that seek to remain within the exemption. All in all, we have here the makings of active but wholly unnecessary and inappropriate federal government involvement in regulating state and local political activity.

This is one problem, and another is the impenetrability of key terms used to define the bill's aims and purposes. What does it mean to "promote, support, attack or oppose" a political party? The bill does not say. What does it mean that federal candidates or national party officials cannot "materially participate" in voter drives of state and local PACs? The bill does not say. The answer is being left to contentious rulemakings, enforcement actions, and litigation.

Damaging to Party Association and Development. As noted, the bill conditions various exemptions for State and local PACs, including those controlled by officeholders or candidates, on avoiding in their voter drive activities the promotion of their party, or opposition to another. This provision is unhelpful to the project of building stronger, more cohesive parties, particularly at the State and local level. It builds upon the anti-party program of BCRA and exacerbates its harmful effects.

Invites FEC Controversy. The bill introduces additional potential instability by conferring on the FEC—the very agency regularly denounced by the sponsors—to provide key definitions and supporting interpretations through implementing rules. The bill sets two timetables for this process: 60 and 180 days, for the 527 and allocating committee portions, respectively. This is a prescription for what we have seen in the post-BCRA rulemaking process: confusion, controversy, litigation and endless revision. This is unfair to the regulated community, assures a numbing complexity before this all ends (if it does), and will all occur outside the public view at some cost to public understanding and transparency. The sponsors should define their terms and build and defend their position now, not leave it to an agency that they have alleged to be incompetent and pledged to abolish.

Indeterminate Restrictions on "Allocating Committees." The bill at once proposes minimums for the share of hard money paid by allocating committees, for mixed purpose activities, while at the same time inviting the FEC to raise all minimums and perhaps also reduce the minimums for the payment for overhead. As a result, with the passage of the bill, the law becomes less rather than more clear: various issues will be referred to the FEC for further decision-making. This is also a bad idea.

Inappropriate Restrictions on Fundraising by Allocating Committees for Mixed Purpose Activities

The bill establishes the concept of a "qualified nonfederal account" for mixed purpose activities, but only individuals may contribute to that account and then only in amounts of

$25,000 per calendar year. Federal officeholders and others who may not raise "soft money" under BCRA may not assist allocating committees with raising this kind of money. This is an example of the conceptual conflicts—like the one that affects the border between federal activity, on the one hand, and state and local activity, on the other—that afflict the bill. Is this limit a hard money limit or a soft money limit? Since the limit restricts who may give and how much, it certainly would seem to be a hard money limit, set by federal law. If so, why should there be restrictions on who can help to raise it? The bill's drafts seem wedded to restrictions of every stripe, even if they are fraught with this sort of internal inconsistency.

Conclusion

S. 271/H.R. 513 is:

(1) Not needed by any coherent, well-supported policy rationale;
(2) Argued on weak grounds;
(3) Technically deficient;
(4) Likely to invite still more unneeded regulation of more groups in the future;
(5) Threatening to lawful state and local activity
(6) An inappropriate response to partisan skirmishing in the last election and certain to raise concerns about favoring one partisan interest over another; and
(7) Bad for party health and development

So it is a bad idea and I urge the Committee to set it aside.